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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER, Plaintiff, vs. THE VONS COMPANIES, INC., dba VONS #2360, Defendant.	Case No.: '08 CV 0082 IEG (RBB) **OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY FEES** **Hearing Date: May 5, 2008** **Time: 10:30 a.m.** **Courtroom: 1**

Defendant The Vons Companies, Inc. ("Vons") opposes the motion for attorney fees filed by plaintiff Chris Kohler ("Plaintiff") on the ground that the amounts claimed are excessive and unreasonable. Vons accordingly asks the Court to award Plaintiff only the reasonable and justifiable amount of $3,198.00 in attorney fees, litigation expenses, and costs, rather than the far higher amount sought by Plaintiff.

This is a very simple, garden-variety ADA case. Plaintiff's attorney has filed at least several hundred such ADA cases against retail businesses throughout California. There are no time-consuming complexities, no novel legal issues. For example, except for the names of the parties and store location, and for a single paragraph containing a few allegations specific to this store, Plaintiff's complaint is word-for-word identical to the complaint filed by the same plaintiff's attorney, Lynn Hubbard, in many other ADA cases. (As an example, compare the complaint in this lawsuit, Exhibit 1 attached to this brief, with the complaint filed by the same plaintiff and plaintiff's attorney in *Kohler v. PETCO et al.*, Exhibit 2 to this brief.)

After filing the complaint in this lawsuit, Plaintiff did nothing other than accept Vons' Rule 68 offer a few days after Vons filed its answer to the complaint. There was no written discovery, no motion practice, no depositions, and no court appearances.

Additionally, Plaintiff in this case seeks attorney fees at an hourly rate that far exceeds the hourly rate awarded to the same attorneys in very similar ADA cases by other district court in California within the last year. Vons accordingly asks that any award in this case be made at the hourly rates awarded in those cases, i.e., $250/hour for Lynn Hubbard, $175/hour for Scottlynn Hubbard, and $90/hour for paralegals.

Finally, many of the "paralegal" time entries should not be allowed here, because the work performed was mere clerical or secretarial work for which attorneys are not allowed to recover. Such costs are part of the normal, non-recoverable overhead expenses of any legal office.

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I.

ALL CLAIMED TIME THAT IS EXCESSIVE, REDUNDANT, OR OTHERWISE UNNECESSARY SHOULD BE EXCLUDED.

A prevailing party in an ADA action can recover, under 42 U.S.C. section 12205, a "reasonable attorney's fee, including litigation expenses and costs." Obviously, the statutory limitation to "reasonable" fees and costs means that this Court should exclude everything that is unreasonable, and everything for which the Plaintiff has not met his burden of proving reasonableness. See *Fischer v. SBPD, Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000) (applicant for award of attorney fees bears the burden of establishing entitlement and clearly documenting the hours expended and the hourly rates); *Hensley v. Eckerhart*, 461 U.S. 427, 427 (1983) (the Court must exercise its discretion to determine the "reasonableness" of the fees claimed by the prevailing party).

Courts have exercised this discretion and closely examined attorney fee award applications in ADA litigation. "The court should exclude hours that are 'excessive, redundant, or otherwise unnecessary.'" *White v. J.A. Sutherland, Inc. dba Taco Bell #2463*, 2005 WL 1366487, at *4 (E.D. Cal., May 6, 2005), quoting *Hensley v. Eckerhart*, 461 U.S. at 433.

There are two categories here that should be closely examined by the Court, and excessive claimed hours excluded. Those are the amount of attorney time claimed, and the time claimed for paralegal work that is really only unbillable clerical/secretarial work. Also, the Court should only award Plaintiff the same hourly rates awarded to the same attorneys in very similar cases within the past year, rather than the higher rates sought herein by Plaintiff.

A. The Claimed Attorney Time Should Be Reduced By At Least 7.4 Hours.

Plaintiff's attorney Lynn Hubbard is, as he notes in his declaration filed herewith, an exceedingly experienced attorney in ADA "equal access" lawsuits, having litigated more than 500 such lawsuits in California, and devoting more than 95 percent of his law practice to such cases. (Hubbard Decl., ¶¶ 14, 15.)

An attorney with that amount of experience, filing a case such as this one that is very similar to more than 500 others that he has filed, and having to do nothing more than change a few names in a stock complaint, file and serve the complaint, and accept a prompt offer of judgment under Rule 68, does not reasonably require 17.55 hours of attorney time.

Among the excessive claimed entries are two separate entries by Lynn Hubbard, within less than a week of one another, on January 3 and 7, 2008, of 3.0 hours each for inspecting the property – which, in this case, constitutes a standard-sized Vons store and the parking area adjacent thereto. At most, the Court should award fees for one of those two three-hour time entries, and delete the other entry of 3.0 hours.

Another excessive entry is dated March 17, 2008, showing that Mr. Hubbard claims 1.6 hours on that date for preparing the bill of costs in this case – a bill that contains only two cost items (the filing fee for the complaint, and the cost of service). An attorney acting reasonably would have a paralegal prepare this very short, uncomplicated bill, and spend, at most, 15 minutes of attorney time reviewing it. Accordingly, this entry should be reduced from 1.6 hours to 0.25 hours of Mr. Hubbard's time.

Finally, the last entry, dated March 18, 2008, is also excessive and should be reduced. On that date, Mr. Hubbard claims 4.35 hours for preparing the instant motion for attorney fees. As the Court is aware, plaintiff's motion is less than three pages of text, plus a declaration from Mr. Hubbard (most of which is standard and not prepared "from scratch" for this particular lawsuit). A reasonable amount of attorney time for this task would be, at most, 2.0 hours. The Court should therefore award no more than 2.0 hours for this task, reduced from the claimed 4.35 hours.

Two other entries for Lynn Hubbard should be stricken entirely: The January 8, 2008 entry, 0.3 hours for "letter to client re fee agreement", and 0.4 hours on January 11, 2008 for "create client fee agreement." The client fee agreement is a clerical task, part of the normal attorney office overhead (see discussion and authority below, in section C), and time spent on that is not recoverable as reasonable attorney fees here.

Thus, overall, the Court should reduce the claimed time for Lynn Hubbard from 16.95 hours to 9.55 hours.

B. The Court Should Award $250 Per Hour for Lynn Hubbard's Time, $150 Per Hour for Scottlynn Hubbard, and $75 Per Hour for Paralegals, Consistent With Other Fee Awards in California to Mr. Hubbard's Firm Within the Past Year.

Plaintiff's motion seeks $350 per hour for Lynn Hubbard's time, $225 per hour for Scottlynn Hubbard's time, and $90 per hour for paralegal time.

The Court should reduce those rates to the reasonable rates awarded to Mr. Hubbard and his law firm by other district courts in California, including cases within the past twelve months, for their similar work in similar ADA litigation, and those rates are $250 per hour for Lynn Hubbard, $150 per hour for Scottlynn Hubbard, and $75 per hour for paralegals.

In determining the reasonableness of hourly rates, courts "look ... to the 'prevailing market rates in the relevant community.'" *Eiden v. Thrifty Payless, Inc.*, 407 F. Supp. 2d 1165 (2005), quoting *Blum v. Stenson*, 465 U.S. 886, 895 (1984). Mr. Hubbard's firm, Disabled Advocacy Group APLC, have their office in the rural northern California community of Chico, and that is the relevant community for assessing their hourly rates.

These district courts in California, including two within the past year, have made the same assessment, for the same attorneys, in very similar ADA litigation, and concluded that the reasonable rates that should be awarded are $250 per hour for Lynn Hubbard, $150 per hour for Scottlynn Hubbard, and $75 per hour for paralegals: *Chapman v. Pier I Imports, Inc.*, 2007 WL 2462084, *4 (E.D. Cal. Aug. 24, 2007) (awarding $250 per hour for Lynn Hubbard and $150 per hour for Scottlynn Hubbard, and $75 per hour for paralegals; rejecting Mr. Hubbard's requests for higher rates); *Martinez v. G. Maroni Co.*, No. Civ. S-06-1399, 2007 WL 1302739, at *2 (E.D. Cal. May 2, 2007) (also awarding $250/hour to Lynn Hubbard, $150/hour for Scottlynn Hubbard, and $75/hour for paralegals); *Martinez v. Thrifty Payless, Inc.*, No. 2:02-CV-0745, 2006 WL 279309, at *3 (E.D. Cal., Feb. 6, 2006) (same).

C. The Claimed Paralegal Time Should Be Reduced By 1.7 Hours.

Paralegals and legal assistants cannot charge for time incurred in performing "clerical" tasks, and all such claimed charges in Plaintiff's motion should be stricken. Similar claims by Mr. Hubbard and his firm have been rejected in the past. *Loskot v. USA Gas Corp.*, 2004 U.S.

Dist. Lexis 29174 (E.D. Cal. Apr., 26, 2004). Other federal courts have held similarly: Secretarial salaries and benefits are "A part of the usual and ordinary expenses of an attorney in his practice [and] are not separately reimbursable, for these constitute his overhead or cost of doing business and are taken in to account in determining his hourly rate…." *In re Pac. Exp., Inc.*, 56 B.R. 859, 865 (Bkrtcy. E.D. Cal. 1985).

For these reasons, the following claimed entries of paralegal time should be deleted, as being clerical/secretarial in nature: "Kaina" entries on January 7, 2008 (0.4 hours for "create client file"), January 18, 2008 (0.3 hours for "prepare process serving request form…"), February 12, 2008 (0.3 hours for "update file with defendant's attorney information…"), March 6, 2008 (0.3 hours for "review and update calendar…"). Additionally, the 0.4 hours billed by Kaina on March 13, 2008 should be disallowed, as it is clearly unreasonable for Mr. Hubbard's office to bill 0.4 hours for correspondence about a meet-and-confer at the property almost a month after such a meeting was rendered unnecessary by Plaintiff's February 18, 2008 acceptance of the Rule 68 offer of judgment.

Thus, the Court should reduce the claimed paralegal time by 1.7 hours, i.e., from 6.2 hours to 4.5 hours.

II.

CONCLUSION

For the reasons set forth herein, the Court should make the following reductions in Plaintiff's claim for attorney fees, paralegal fees, and litigation expenses and costs:

(1) Reduce claimed time for Lynn Hubbard from 16.95 hours to 9.55 hours.

(2) Reduce claimed paralegal time from 6.2 hours to 4.5 hours.

(3) Reduce hourly rates to the reasonable, established amounts for Mr. Hubbard's firm of $250 per hour for Lynn Hubbard, $150 per hour for Scottlynn Hubbard, and $75 per hour for paralegals.

(4) Additionally, litigation expenses and costs must be counted only once. Plaintiff submitted a bill of costs separately from his motion for attorney fees. Those costs cannot be awarded twice.

Applying those reductions, the Court should award Plaintiff no more than $3,198.00 in attorney fees, litigation expenses, and costs, as follows:

Lynn Hubbard:	9.55 hours at $250 per hour	= $2,387.50
Scottlynn Hubbard:	0.6 hours at $150 per hour	= $90.00
Paralegals:	4.5 hours at $75 per hour	= $337.50
Litigation Expenses and Costs (if not separately awarded)		= $383.00

FINAL TOTAL		**= $3,198.00**

Dated: April 14, 2008

MAZZARELLA ■ CALDARELLI LLP

By: /s/ Michael D. Fabiano
MICHAEL D. FABIANO
Attorneys for Defendant
THE VONS COMPANIES, INC.

EXHIBIT 1

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FILED
JAN 14 2008
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

ORIGINAL

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER, Plaintiff, vs. THE VONS COMPANIES, INC. dba VONS #2360, Defendant.	No. '08 CV 0082 IEG RBB **Plaintiff's Complaint**

I. SUMMARY

1. This is a civil rights action by plaintiff Chris Kohler ("Kohler") for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Vons #2360 DIST #56
845 College Boulevard
Oceanside, CA 92057
(hereafter "the Store")

2. Kohler seeks damages, injunctive and declaratory relief, attorney fees and costs, against The Vons Companies, Inc. dba Vons #2360 (collectively "Vons") pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.), and related California statutes.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law—arising from the same nucleus of operative facts—is predicated on 28 U.S.C. § 1367.

5. Kohler's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Southern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

IV. PARTIES

7. Vons owns, operates, or leases the Store, and consists of a person (or persons), firm, or corporation.

8. Kohler was shot in the back in 1988, which left him paralyzed from the waist down. Kohler requires the use of a wheelchair when traveling about in

public. Consequently, Kohler is "physically disabled," as defined by all applicable California and United States laws, and a member of the public whose rights are protected by these laws.

V..FACTS

9. The Store is a sales or retail establishment, open to the public, which is intended for nonresidential use and whose operation affects commerce.

10. Kohler visited the Store and encountered barriers (both physical and intangible) that interfered with—if not outright denied—his ability to use and enjoy the goods, services, privileges, and accommodations offered at the facility. To the extent known by Kohler, the barriers at the Vons included, but are not limited to, the following:

- There is no accessible path from the public transportation to the entrance of the store;
- The tow away signage posted uses the term "handicapped;"
- The trash receptacle obstructs the path of travel to the entrance of the store;
- The pottery counter does not have the required clear floor space;
- Of the six check-out stands provided, none are designated as being accessible, nor have a sign stating that the checkstand(s) are to remain open at all times for person with disabilities;
- The pay point machines are too high and out of the required reach range limits;
- In the restroom, the toilet tissue dispenser protrudes into the clear maneuvering space needed at the water closet;
- The paper towel dispenser interferes with the clear maneuvering space needed at the water closet;
- The pipes underneath the lavatory are not properly wrapped; and,
- There is improper toe and knee clearance underneath the lavatory.

These barriers prevented Kohler from enjoying full and equal access.

11. Kohler was also deterred from visiting the Store because he knew that the Store's goods, services, facilities, privileges, advantages, and accommodations were unavailable to physically disabled patrons (such as himself). He continues to be deterred from visiting the Store because of the future threats of injury created by these barriers.

12. Kohler also encountered barriers at the Store, which violate state and federal law, but were unrelated to his disability. Nothing within this Complaint, however, should be construed as an allegation that Kohler is seeking to remove barriers unrelated to his disability.

13. Vons knew that these elements and areas of the Store were inaccessible, violate state and federal law, and interfere with (or deny) access to the physically disabled. Moreover, Vons has the financial resources to remove these barriers from the Store (without much difficulty or expense), and make the facility accessible to the physically disabled. To date, however, Vons refuses to either remove those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

14. At all relevant times, Vons has possessed and enjoyed sufficient control and authority to modify the subject property to remove impediments to wheelchair access and to comply with the Americans with Disabilities Act Accessibility Guidelines and Title 24 regulations. Vons has not removed such impediments and have not modified the subject property to conform to accessibility standards. Vons has intentionally maintained the subject property in its current condition and has intentionally refrained from altering the subject property so that it complies with the accessibility standards.

15. Kohler further alleges that the (continued) presence of barriers at the facility is so obvious as to establish Vons' discriminatory intent.[1] On information and belief, Kohler avers that evidence of this discriminatory intent includes Vons' refusal to adhere to relevant building standards; disregard for the building plans and permits issued for the facility; conscientious decision to the architectural layout (as it currently exists) at the facility; decision not to remove barriers from the facility; and allowance that Vons' property continues to exist in its non-compliant state. Kohler further alleges, on information and belief, that Vons is not in the midst of a remodel, and that the barriers present at the facility are not isolated (or temporary) interruptions in access due to maintenance or repairs.[2]

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

Denial of "Full and Equal" Enjoyment and Use

16. Kohler incorporates the allegations contained in paragraphs 1 through 15 for this claim.

17. Title III of the ADA holds as a "general rule" that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment (or use) of goods, services, facilities, privileges, and accommodations offered by any person who owns, operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

18. Vons discriminated against Kohler by denying "full and equal enjoyment" and use of the goods, services, facilities, privileges or accommodations of the Store during each visit and each incident of deterrence.

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[1] E.g., *Gunther v. Lin*, 144 Cal.App.4th 223, fn. 6

[2] Id.; 28 C.F.R. § 36.211(b)

Failure to Remove Architectural Barriers in an Existing Facility

19. The ADA specifically prohibits failing to remove architectural barriers, which are structural in nature, in existing facilities where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." Id. § 12181(9).

20. When an entity can demonstrate that removal of a barrier is not readily achievable, a failure to make goods, services, facilities, or accommodations available through alternative methods is also specifically prohibited if these methods are readily achievable. Id. § 12182(b)(2)(A)(v).

21. Here, Kohler alleges that Vons can easily remove the architectural barriers at the Store without much difficulty or expense, and that Vons violated the ADA by failing to remove those barriers, when it was readily achievable to do so.

22. In the alternative, if it was not "readily achievable" for Vons to remove the Store's barriers, then Vons violated the ADA by failing to make the required services available through alternative methods, which are readily achievable.

Failure to Design and Construct an Accessible Facility

23. On information and belief, the Store was designed or constructed (or both) after January 26, 1992—independently triggering access requirements under Title III of the ADA.

24. The ADA also prohibits designing and constructing facilities for first occupancy after January 26, 1993, that aren't readily accessible to, and usable by, individuals with disabilities when it was structurally practicable to do so. 42 U.S.C. § 12183(a)(1).

25. Here, Vons violated the ADA by designing or constructing (or both) the Store in a manner that was not readily accessible to the physically disabled public—including Kohler—when it was structurally practical to do so.[3]

Failure to Make an Altered Facility Accessible

26. On information and belief, the Store was modified after January 26, 1992, independently triggering access requirements under the ADA.

27. The ADA also requires that facilities altered in a manner that affects (or could affect) its usability must be made readily accessible to individuals with disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an area that contains a facility's primary function also requires adding making the paths of travel, bathrooms, telephones, and drinking fountains serving that area accessible to the maximum extent feasible. Id.

28. Here, Vons altered the Store in a manner that violated the ADA and was not readily accessible to the physically disabled public—including Kohler—to the maximum extent feasible.

Failure to Modify Existing Policies and Procedures

29. The ADA also requires reasonable modifications in policies, practices, or procedures, when necessary to afford such goods, services, facilities, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

30. Here, Vons violated the ADA by failing to make reasonable modifications in policies, practices, or procedures at the Store, when these modifications were necessary to afford (and would not fundamentally alter the nature of) these goods, services, facilities, or accommodations.

[3] Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action as a private attorney general under either state or federal statutes.

31. Kohler seeks all relief available under the ADA (*i.e.*, injunctive relief, attorney fees, costs, legal expense) for these aforementioned violations. 42 U.S.C. § 12205.

32. Kohler also seeks a finding from this Court (*i.e.*, declaratory relief) that Vons violated the ADA in order to pursue damages under California's Unruh Civil Rights Act or Disabled Persons Act.

VII. SECOND CLAIM

Disabled Persons Act

33. Kohler incorporates the allegations contained in paragraphs 1 through 30 for this claim.

34. California Civil Code § 54 states, in part, that: Individuals with disabilities have the same right as the general public to the full and free use of the streets, sidewalks, walkways, public buildings and facilities, and other public places.

35. California Civil Code § 54.1 also states, in part, that: Individuals with disabilities shall be entitled to full and equal access to accommodations, facilities, telephone facilities, places of public accommodation, and other places to which the general public is invited.

36. Both sections specifically incorporate (by reference) an individual's rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

37. Here, Vons discriminated against the physically disabled public—including Kohler—by denying them full and equal access to the Store. Vons also violated Kohler's rights under the ADA, and, therefore, infringed upon or violated (or both) Kohler's rights under the Disabled Persons Act.

38. For each offense of the Disabled Persons Act, Kohler seeks actual damages (both general and special damages), statutory minimum damages of one thousand dollars ($1,000), declaratory relief, and any other remedy available under California Civil Code § 54.3.

39. He also seeks to enjoin Vons from violating the Disabled Persons Act (and ADA) under California Civil Code § 55, and to recover reasonable attorneys' fees and incurred under California Civil Code §§ 54.3 and 55.

VIII. THIRD CLAIM

Unruh Civil Rights Act

40. Kohler incorporates the allegations contained in paragraphs 1 through 30 for this claim.

41. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

42. California Civil Code § 51.5 also states, in part, that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

43. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

44. Vons' aforementioned acts and omissions denied the physically disabled public—including Kohler—full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability).

45. These acts and omissions (including the ones that violate the ADA) denied, aided or incited a denial, or discriminated against Kohler by violating the Unruh Act.

46. Kohler was damaged by Vons' wrongful conduct, and seeks statutory minimum damages of four thousand dollars ($4,000) for each offense.

47. Kohler also seeks to enjoin Vons from violating the Unruh Act (and ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code § 52(a).

IX. FOURTH CLAIM

Denial of Full and Equal Access to Public Facilities

48. Kohler incorporates the allegations contained in paragraphs 1 through 13 for this claim.

49. Health and Safety Code § 19955(a) states, in part, that: California public accommodations or facilities (built with private funds) shall adhere to the provisions of Government Code § 4450.

50. Health and Safety Code § 19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.

51. Kohler alleges the Store is a public accommodation constructed, altered, or repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code § 4450 (or both), and that the Store was not exempt under Health and Safety Code § 19956.

52. Vons' non-compliance with these requirements at the Store aggrieved (or potentially aggrieved) Kohler and other persons with physical disabilities. Accordingly, he seeks injunctive relief and attorney fees pursuant to Health and Safety Code § 19953.

X. PRAYER FOR RELIEF

WHEREFORE, Kohler prays judgment against Vons for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.

2. Declaratory relief that Vons violated the ADA for the purposes of Unruh Act or Disabled Persons Act damages.

3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the California Civil Code (but not both) according to proof.

4. Attorneys' fees, litigation expenses, and costs of suit.[4]
5. Interest at the legal rate from the date of the filing of this action.

DATED: January 10, 2008

DISABLED ADVOCACY GROUP, APLC

LYNN HUBBARD, III
Attorney for Plaintiff

[4] This includes attorneys' fees under California Code of Civil Procedure § 1021.5.

EXHIBIT 2

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CHRIS KOHLER, Plaintiff, vs. PETCO ANIMAL SUPPLIES STORES, INC. dba PETCO #927; GOLDEN EAGLE MANAGEMENT, LLC, Defendants.	Case No. 07cv2125 W (AJB) **Plaintiff's First Amended Complaint**

I. SUMMARY

1. This is a civil rights action by plaintiff Chris Kohler ("Kohler") for discrimination at the building, structure, facility, complex, property, land, development, and/or surrounding business complex known as:

Petco #927
3875 Mission Avenue
Oceanside, CA 92058
(hereafter "the Store")

2. Kohler seeks damages, injunctive and declaratory relief, and attorney fees and costs against Petco Animal Supplies Stores, Inc. dba Petco #927 and Golden Eagle Management, LLC (collectively "Petco") pursuant to the Americans with Disabilities Act of 1990, (42 U.S.C. §§ 12101 et seq.), and related California statutes.

II. JURISDICTION

3. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343 for ADA claims.

4. Supplemental jurisdiction for claims brought under parallel California law—arising from the same nucleus of operative facts—is predicated on 28 U.S.C. § 1367.

5. Kohler's claims are authorized by 28 U.S.C. §§ 2201 and 2202.

III. VENUE

6. All actions complained of herein take place within the jurisdiction of the United States District Court, Southern District of California, and venue is invoked pursuant to 28 U.S.C. § 1391(b), (c).

IV. PARTIES

7. Petco owns, operates, or leases the Store, and consists of a person (or persons), firm, or corporation.

8. Kohler was shot in the back in 1988, which left him paralyzed from the waist down. He requires the use of a wheelchair when traveling about in public. Consequently, Kohler is "physically disabled," as defined by all applicable California and United States laws, and a member of the public whose rights are protected by these laws.

V. FACTS

9. The Store is a sales or retail establishment, open to the public, which is intended for nonresidential use and whose operation affects commerce.

10. Kohler visited the Store and encountered barriers (both physical and intangible) that interfered with—if not outright denied—his ability to use and enjoy the goods, services, privileges, and accommodations offered at the facility. To the extent known by Kohler, the barriers at the Petco included, but are not limited to, the following:

- The disabled parking space has an excessive slope;
- The access aisle adjacent to the disabled parking space has an excessive slope;
- None of the accessible spaces are designated as van accessible;
- The International Symbol of Accessibility ("ISA") painted in the disabled parking spaces are not the correct size;
- There is no ISA posted at the entrance doors;
- The entrance doors require too much force to operate;
- The counter is mounted too high for a person in a wheelchair to access;
- Inside the Store, there is no signage directing one to the restrooms;
- The accessible stall door in the restroom is not self closing;
- The toilet tissue dispenser protrudes into the clear floor space needed at the water closet;
- The toilet tissue dispenser has sharp edges;

- On the interior of the stall door, there is no handle mounted below the lock;
- The coat hook on the interior of the stall door is mounted too high;
- The pipes underneath the lavatory are not properly wrapped;
- There is insufficient knee clearance underneath the lavatory; and,
- The lavatory controls require twisting and pinching.

These barriers prevented Kohler from enjoying full and equal access.

11. Kohler was also deterred from visiting the Store because he knew that the Store's goods, services, facilities, privileges, advantages, and accommodations were unavailable to physically disabled patrons (such as himself). He continues to be deterred from visiting the Store because of the future threats of injury created by these barriers.

12. Kohler encountered barriers at the Store, which violate state and federal law, but were unrelated to his disability. Nothing within this Complaint, however, should be construed as an allegation that Kohler is seeking to remove barriers unrelated to his disability.

13. Petco knew that these elements and areas of the Store were inaccessible, violate state and federal law, and interfere with (or deny) access to the physically disabled. Moreover, Petco has the financial resources to remove these barriers from the Store (without much difficulty or expense), and make the facility accessible to the physically disabled. To date, however, Petco refuses to either remove those barriers or seek an unreasonable hardship exemption to excuse non-compliance.

14. At all relevant times, Petco has possessed and enjoyed sufficient control and authority to modify the subject property to remove impediments to wheelchair access and to comply with the Americans with Disabilities Act Accessibility Guidelines and Title 24 regulations. Petco has not removed such impediments and has not modified the subject property to conform to

accessibility standards. Petco has intentionally maintained the subject property in its current condition and has intentionally refrained from altering the subject property so that it complies with the accessibility standards.

15. Kohler further alleges that the (continued) presence of barriers at the facility is so obvious as to establish Petco's discriminatory intent.[1] On information and belief, Kohler avers that evidence of this discriminatory intent includes Petco's refusal to adhere to relevant building standards; disregard for the building plans and permits issued for the facility; conscientious decision to the architectural layout (as it currently exists) at the facility; decision not to remove barriers from the facility; and allowance that Petco's property continues to exist in its non-compliant state. Kohler further alleges, on information and belief, that Petco are not in the midst of a remodel, and that the barriers present at the facility are not isolated (or temporary) interruptions in access due to maintenance or repairs.[2]

VI. FIRST CLAIM

Americans with Disabilities Act of 1990

Denial of "Full and Equal" Enjoyment and Use

16. Kohler incorporates the allegations contained in paragraphs 1 through 15 for this claim.

17. Title III of the ADA holds as a "general rule" that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment (or use) of goods, services, facilities, privileges, and accommodations offered by any person who owns, operates, or leases a place of public accommodation. 42 U.S.C. § 12182(a).

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[1] E.g., *Gunther v.Lin*, 144 Cal.App.4th 223, fn. 6
[2] Id.; 28 C.F.R. § 36.211(b)

18. Petco discriminated against Kohler by denying "full and equal enjoyment" and use of the goods, services, facilities, privileges or accommodations of the Store during each visit and each incident of deterrence.

Failure to Remove Architectural Barriers in an Existing Facility

19. The ADA specifically prohibits failing to remove architectural barriers, which are structural in nature, in existing facilities where such removal is readily achievable. 42 U.S.C. § 12182(b)(2)(A)(iv). The term "readily achievable" is defined as "easily accomplishable and able to be carried out without much difficulty or expense." Id. § 12181(9).

20. When an entity can demonstrate that removal of a barrier is not readily achievable, a failure to make goods, services, facilities, or accommodations available through alternative methods is also specifically prohibited if these methods are readily achievable. Id. § 12182(b)(2)(A)(v).

21. Here, Kohler alleges that Petco can easily remove the architectural barriers at the Store without much difficulty or expense, and that Petco violated the ADA by failing to remove those barriers, when it was readily achievable to do so.

22. In the alternative, if it was not "readily achievable" for Petco to remove the Store's barriers, then Petco violated the ADA by failing to make the required services available through alternative methods, which are readily achievable.

Failure to Design and Construct an Accessible Facility

23. On information and belief, the Store was designed or constructed (or both) after January 26, 1992—independently triggering access requirements under Title III of the ADA.

24. The ADA also prohibits designing and constructing facilities for first occupancy after January 26, 1993, that aren't readily accessible to, and usable by,

individuals with disabilities when it was structurally practicable to do so. 42 U.S.C. § 12183(a)(1).

25. Here, Petco violated the ADA by designing or constructing (or both) the Store in a manner that was not readily accessible to the physically disabled public—including Kohler—when it was structurally practical to do so.[3]

Failure to Make an Altered Facility Accessible

26. On information and belief, the Store was modified after January 26, 1992, independently triggering access requirements under the ADA.

27. The ADA also requires that facilities altered in a manner that affects (or could affect) its usability must be made readily accessible to individuals with disabilities to the maximum extent feasible. 42 U.S.C. § 12183(a)(2). Altering an area that contains a facility's primary function also requires adding making the paths of travel, bathrooms, telephones, and drinking fountains serving that area accessible to the maximum extent feasible. Id.

28. Here, Petco altered the Store in a manner that violated the ADA and was not readily accessible to the physically disabled public—including Kohler—to the maximum extent feasible.

Failure to Modify Existing Policies and Procedures

29. The ADA also requires reasonable modifications in policies, practices, or procedures, when necessary to afford such goods, services, facilities, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter their nature. 42 U.S.C. § 12182(b)(2)(A)(ii).

30. Here, Petco violated the ADA by failing to make reasonable modifications in policies, practices, or procedures at the Store, when these

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[3] Nothing within this Complaint should be construed as an allegation that plaintiff is bringing this action as a private attorney general under either state or federal statutes.

modifications were necessary to afford (and would not fundamentally alter the nature of) these goods, services, facilities, or accommodations.

31. Kohler seeks all relief available under the ADA (*i.e.*, injunctive relief, attorney fees, costs, legal expense) for these aforementioned violations. 42 U.S.C. § 12205.

32. Kohler also seeks a finding from this Court (*i.e.*, declaratory relief) that Petco violated the ADA in order to pursue damages under California's Unruh Civil Rights Act or Disabled Persons Act.

VII. SECOND CLAIM

Disabled Persons Act

33. Kohler incorporates the allegations contained in paragraphs 1 through 30 for this claim.

34. California Civil Code § 54 states, in part, that: Individuals with disabilities have the same right as the general public to the full and free use of the streets, sidewalks, walkways, public buildings and facilities, and other public places.

35. California Civil Code § 54.1 also states, in part, that: Individuals with disabilities shall be entitled to full and equal access to accommodations, facilities, telephone facilities, places of public accommodation, and other places to which the general public is invited.

36. Both sections specifically incorporate (by reference) an individual's rights under the ADA. See Civil Code §§ 54(c) and 54.1(d).

37. Here, Petco discriminated against the physically disabled public—including Kohler—by denying them full and equal access to the Store. Petco also violated Kohler's rights under the ADA, and, therefore, infringed upon or violated (or both) Kohler's rights under the Disabled Persons Act.

38. For each offense of the Disabled Persons Act, Kohler seeks actual damages (both general and special damages), statutory minimum damages of one

thousand dollars ($1,000), declaratory relief, and any other remedy available under California Civil Code § 54.3.

39. He also seeks to enjoin Petco from violating the Disabled Persons Act (and ADA) under California Civil Code § 55, and to recover reasonable attorneys' fees and incurred under California Civil Code §§ 54.3 and 55.

VIII. THIRD CLAIM

Unruh Civil Rights Act

40. Kohler incorporates the allegations contained in paragraphs 1 through 30 for this claim.

41. California Civil Code § 51 states, in part, that: All persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

42. California Civil Code § 51.5 also states, in part, that: No business establishment of any kind whatsoever shall discriminate against any person in this state because of the disability of the person.

43. California Civil Code § 51(f) specifically incorporates (by reference) an individual's rights under the ADA into the Unruh Act.

44. Petco's aforementioned acts and omissions denied the physically disabled public—including Kohler—full and equal accommodations, advantages, facilities, privileges and services in a business establishment (because of their physical disability).

45. These acts and omissions (including the ones that violate the ADA) denied, aided or incited a denial, or discriminated against Kohler by violating the Unruh Act.

46. Kohler was damaged by Petco's wrongful conduct, and seeks statutory minimum damages of four thousand dollars ($4,000) for each offense.

47. Kohler also seeks to enjoin Petco from violating the Unruh Act (and ADA), and recover reasonable attorneys' fees and costs incurred under California Civil Code § 52(a).

IX. FOURTH CLAIM

Denial of Full and Equal Access to Public Facilities

48. Kohler incorporates the allegations contained in paragraphs 1 through 13 for this claim.

49. Health and Safety Code § 19955(a) states, in part, that: California public accommodations or facilities (built with private funds) shall adhere to the provisions of Government Code § 4450.

50. Health and Safety Code § 19959 states, in part, that: Every existing (non-exempt) public accommodation constructed prior to July 1, 1970, which is altered or structurally repaired, is required to comply with this chapter.

51. Kohler alleges the Store is a public accommodation constructed, altered, or repaired in a manner that violates Part 5.5 of the Health and Safety Code or Government Code § 4450 (or both), and that the Store was not exempt under Health and Safety Code § 19956.

52. Petco's non-compliance with these requirements at the Store aggrieved (or potentially aggrieved) Kohler and other persons with physical disabilities. Accordingly, he seeks injunctive relief and attorney fees pursuant to Health and Safety Code § 19953.

X. PRAYER FOR RELIEF

WHEREFORE, Kohler prays judgment against Petco for:

1. Injunctive relief, preventive relief, or any other relief the Court deems proper.

2. Declaratory relief that Petco violated the ADA for the purposes of Unruh Act or Disabled Persons Act damages.

3. Statutory minimum damages under either sections 52(a) or 54.3(a) of the California Civil Code (but not both) according to proof.

4. Attorneys' fees, litigation expenses, and costs of suit.[4]

5. Interest at the legal rate from the date of the filing of this action.

DATED: January 29, 2008 LAW OFFICES OF LYNN HUBBARD

/s/ Lynn Hubbard, III
LYNN HUBBARD, III
Attorney for Plaintiff, Chris Kohler

[4] This includes attorneys' fees under California Code of Civil Procedure § 1021.5.